not have been in a position to determine the conduct of the respondent or the conditions of the oral agreement which, in law or equity, would warrant recovery by the appellant of the payment that had been made.

In the circumstances we see no ground for disturbing the decision of the trial court in dismissing the claim.

The appeal is dismissed with costs. Deposit to respondent towards taxed costs.

Appeal dismissed.

Solicitors: *Jegathesan & Co.; Wan Adib & Co.*

CENTRAL SECURITIES (HOLDINGS) BHD. v. HARON BIN MOHAMED ZAID

[F.C. (Raja Azlan Shah Ag. L.P., Chang Min Tat & Ibrahim Manan F.JJ.) September 26 & November 1, 1979]
[Kuala Lumpur — Federal Court Civil Appeal No. 105 of 1978]

Practice and Procedure — Appeal to the Yang di-Pertuan Agong — Interlocutory judgment or order — Whether judgment under Order 14 a final order — Certificate that judge requires no further argument — Appeal from High Court — Whether judgment or order fit one for appeal — R.S.C., 1957 O. 54, rr. 22, 22A & 23 — Courts of Judicature Act, 1964, ss. 68(2), 74.

The respondent applied for leave to appeal to the Yang di-Pertuan Agong from two orders made by the Federal Court — see [1979] 2 M.L.J. 244. The first order was a dismissal of the respondent's application to abort the appeal of the third party (appellant) from the High Court on a contention that the appeal being one from an interlocutory judgment or order was without the leave of a judge of the High Court in Chambers as required by section 68(2) of the Courts of Judicature Act, 1964 and therefore not properly before the Federal Court. The second was an order setting aside the order giving the respondent leave to sign final judgment against the appellant on a summons for directions brought by the respondent against the third party (appellant).

In the High Court the learned judge had dismissed the application to set aside the third party notice and given leave to the respondent to sign final judgment against the third party (appellant) on his summons. The learned judge subsequently indicated under rule 22A of Order 54 of the Rules of the Supreme Court that he did not require further argument. In the circumstances even if the matter was interlocutory no leave was required for the appeal and the Federal Court dismissed the respondent's application to stop the appeal. The Federal Court also gave unconditional leave to defend. The respondent applied for leave to appeal to the Yang di-Pertuan Agong as it was argued that the case was a fit one for appeal.

Held: (1) the Federal Court was bound to follow its previous decisions which have held that an order giving leave to sign final judgment is a final and not an interlocutory order;

(2) in this case if the order refusing to strike out the third party notice and the Order 14 judgment are interlocutory then the certificate of not requiring further argument obtained on the solicitor's application rendered the appeal to the Federal Court competent. If the Order 14 judgment was final then no leave was required and the appeal was of right. There was therefore no real difference in the appeal procedure requiring the Federal Court to make a reference to the Privy Council for final determination whether an Order 14 judgment was final or interlocutory;

(3) in the circumstances of this case, the case was not a fit one for appeal and therefore the applications must be dismissed.

Cases referred to:-

(1) *Lopez* v. *Velliappa Chettiar* [1968] 1 M.L.J. 224 P.C.
(2) *Re Croasdell & Cammell Laird & Co.* [1906] 2 K.B. 569.
(3) *Nagappa Rengasamy Pillai* v. *Lim Lee Chong* [1968] 2 M.L.J. 91 F.C.
(4) *T.O. Thomas* v. *K.C.I. Reddy & Anor.* [1974] 2 M.L.J. 87 F.C.
(5) *Salaman* v. *Warner* [1891] 1 Q.B. 734.
(6) *Standard Discount Co.* v. *La Grange* (1877) 3 C.P.D. 67.
(7) *Egerton* v. *Shirley* [1945] K.B. 107, 110.
(8) *Bozson* v. *Altrincham Urban District Council* [1903] 1 K.B. 547.
(9) *Tampion* v. *Anderson* (1974) 48 A.L.J.R. 11, 12.
(10) *Salter Rex & Co.* v. *Ghosh* [1971] 2 Q.B. 597, 601.
(11) *Peninsular Land Development Sdn. Bhd.* v. *K. Ahmad (No. 2)* [1970] 1 M.L.J. 253 F.C.
(12) *Hong Kim Sui* v. *Malayan Banking Berhad* [1971] 1 M.L.J. 289 F.C.
(13) *Becker* v. *Marion City Corporation* [1976] 2 W.L.R. 728 P.C.
(14) *In re Page, Hill* v. *Fladgate* [1910] 1 Ch. 489.
(15) *Price* v. *Phillips* (1894) 11 T.L.R. 86.
(16) *Hunt* v. *Allied Bakeries Ltd.* [1956] 1 W.L.R. 1326.
(17) *Technistudy Ltd.* v. *Kelland* [1976] 1 W.L.R. 1042; [1970] 3 All E.R. 632.
(18) *Ratnam* v. *Cumarasamy & Anor.* [1962] M.L.J. 330.
(19) *Young* v. *British Aeroplane Co. Ltd.* [1944] K.B. 718 C.A.
(20) *Huddersfield Police Authority* v. *Watson* [1947] 1 K.B. 842.
(21) *Davis* v. *Johnson* [1978] 2 W.L.R. 553; [1978] 1 All E.R. 1132.

FEDERAL COURT.

V.C. George (*K.S. Narayanan* with him) for the applicant.

M. Sivalingam (*Nik Mohamed Din bin Nik Yusoff* with him) for the respondent.

Cur. Adv. Vult.

Chang Min Tat F.J. (delivering the judgment of the Court): The defendant Haron bin Mohd. Zaid (Haron) applies for the leave of this court to appeal to His Majesty the Yang di-Pertuan Agong from two orders made by this court, the first an order made on February 27, 1979 and the second an order made on May 16, 1979.

Appeals to the Yang di-Pertuan Agong are governed by the provisions of section 74 of the Courts of Judicature Act, 1964. An appeal lies with the leave of the Federal Court,

"74(1)(a) from any final judgment or order in any civil matter where

(i) the matter in dispute in the appeal amounts to or is of the value of twenty-five thousand dollars or upwards;
(ii) the appeal involves, directly or indirectly, some claim or question to or respecting property or some civil right of like amount or value; or
(iii) the case is from its nature a fit one for appeal; and

(b) from any interlocutory judgment or order which the Federal Court considers a fit one for appeal."

Section 75(1) sets a time limit of six weeks for an application for leave from the date on which the decision appealed against was made. Time may however be extended by the Federal Court. Section 75(2) spells out the powers of the Federal Court to set conditions regarding the execution of the order sought to be appealed from or for a stay.

Though the leave of the Federal Court is required in all cases, *Lopez* v. *Velliappa Chettiar*[1] has laid

down what appears so clearly in the wording that an appeal under section 74(1)(a)(i) or (ii) is as of right and the Federal Court has no discretion to refuse leave to appeal. The leave for appeals under section 74(1)(a)(i) or (ii) is referrable only to the conditions for such leave in section 75. The Federal Court has discretion to refuse leave only in cases which come within section 74(1)(a)(iii) or 74(1)(b). In the latter case, leave will only be granted if in the opinion of this court, the interlocutory judgment or order is one fit for appeal.

The earlier order is a dismissal of Haron's application to abort the appeal of the third party in the action, Central Securities, from the High Court to this court on a contention that the appeal being one from an interlocutory judgment or order was without the leave of a judge of a High Court in Chambers as required by section 68(2) Courts of Judicature Act, 1964 and therefore not properly brought before this court. The second is an order setting aside the order giving Haron leave to sign final judgment against Central Securities on a summons for directions brought by Haron against the third party.

Mr. George for Haron concedes, in our opinion entirely correctly, that both orders he seeks the leave of this court to appeal from are interlocutory. An order setting aside an award of an arbitration has been held to be interlocutory: *Re Croasdell & Cammell Laird & Co.*[2] He accepts the burden of satisfying us that they are fit ones for appeal. He concedes further that so far he has lost nothing really. Haron's claim against the third party will go to trial and stands to be adjudicated. But he does not see why he should lose the benefit of his earlier victory in the form of the Order 14 judgment in the High Court and in his view, his best course would be to restore this judgment before their Lordships of the Privy Council by an objection to the appeal from the High Court to the Federal Court on purely procedural grounds. It is his contention that the several decisions on appeal procedure conflict and urgently require final determination by the highest court.

It may be convenient to deal, at this stage, with his procedural objections.

Section 68(2) reads:

"(2). No appeal shall lie from an interlocutory order made by a judge of a High Court in Chambers, unless the judge has certified, after application within four days after the making of such order by any party for further argument in court, that he requires no further argument or unless leave is obtained from the Federal Court or from a judge of the High Court."

Haron contends, unless we have misunderstood him altogether, that the appeal to this court had not complied with the requirements of this section. No leave had in fact been obtained.

What had happened was this: Haron consented to judgment and at the same time he applied for a third party notice to be issued to Central Securities who thereupon entered a conditional appearance and within time took out a summons for the dismissal of the notice. This summons was heard by the judge together with Haron's application for third party directions wherein he also prayed for judgment against Central Securities as on an Order 14 application. The parties came before the judge in chambers when no argument seemed to have been presented. By common consent, the parties appeared in court when after argument, the judge dismissed Central Securities' application to set aside the third party notice and gave leave to Haron to sign final judgment against Central Securities on his summons. That was on June 28, 1978. The decisions, though made in court and not in chambers, are however deemed to be decisions at chambers, by the provisions of Order 54 rule 22 Rules of the Supreme Court, 1957.

A dissatisfied party, if desirous of taking the matter further, is bound to observe the requirements of rule 22A which is a local rule but which appears to be an adaption of Order 55 rule 14D in the 1957 *Annual Practice*. It is in these words:

"22A. Any party dissatisfied with any order made by a judge in Chambers may apply, at the time the order is made, orally, or at any time within four days from the day of the order in writing to the Registrar, for the adjournment of the matter into court for further argument; and on such application, the judge may either adjourn the matter into court and hear further argument, or may certify in writing that he requires no further argument. If the judge hears further argument he may set aside the order previously made, and make such other order as he thinks fit."

It does not appear from the Record of Appeal but it certainly does from the High Court file to which we have made reference that on June 29, 1978, that is, the next day after the orders were made and therefore well within the four days specified, the solicitors for Central Securities made application by letter for further argument on both matters into court. This letter was received on June 30 and placed before the judge. On July 4, 1978, the judge indicated that he would issue a certificate that he required no further argument. The certificate issued however was in respect only of Haron's application for third party directions. It clearly did not set out the manifest intention of the judge. As we understand the practice in the Kuala Lumpur registry, it was the registry itself which typed out the certificate for issue. Whether or not Haron's solicitors were aware of this application, the fact that the certificate did not extend to the summons for the dismissal of the action is not the reason for or the substance of Haron's contention that Central Securities' appeal to this court was incompetent.

Rule 23 of the same order provides for an appeal from the decision of a judge at chambers to the Federal Court. Therefore conditional on Central Securities having complied with the requirements in rule 22A, the way was open to them to go on appeal. It is not apparent how Central Securities could be said not to have complied with rule 22A.

Since no grounds of decision had been given, we do not know the reason why the Federal Court dismissed Haron's application to stop the appeal thereto, but the reason seems obvious. Leave from the Federal Court or from a Judge of the High Court is not a *sine qua non*, without which an appeal cannot proceed, if an application has been made for further argument within four days and the judge has certified, after application that he requires no further argument. Leave is only required if no application has been made and no certificate has been issued.

Having regard to the fact that this is not a case where further argument has been heard, we are not called upon to decide between the conflicting decisions of *Nagappa Rengasamy Pillai* v. *Lim Lee Chong*[3] and *T.O. Thomas* v. *K.C.I. Reddy & Anor.*[4] The former case decided that after such further argument in court, the first limb of section 68(2) of the Courts of Judicature Act, 1964 did not apply and there was no need to apply for a certificate but there was every need under the second limb to apply for leave. Without such leave, by reason of the clear dichotomy in the section, no appeal lay. In the latter, by a majority, the Federal Court held that in such a circumstance, no leave was required. The appeal was as of right. Here, the certificate was given after application made within time. The first limb of section 68A had been satisfied, and in the circumstance no conflict arises between this section and Order 54 rule 22A, which would appear to be the reason given by Tun Azmi L.P. in the *T.O. Thomas'* case for distinguishing *Nagappa Rengasamy Pillai's* case in which he had concurred with the judgment of H.T. Ong F.J. (as he then was).

The real bait offered by Mr. George is however a temptation to refer to the Privy Council for decision as to the proper test to apply to decide when a judgment or order is final and when it is interlocutory. The courts in England have tended to differ in their views of what is the proper test to be applied. One test considers the nature of the application in which the order is made. It was applied in this form in *Salaman* v. *Warner*[5] and has come to be known as the *Salaman* test, but it was actually first formulated by Lord Esher M.R. (then Brett L.J.) in *Standard Discount Co.* v. *La Grange.*[6] As Du Parcq L.J. put it in *Egerton* v. *Shirley*[7] at page 110, an order is an interlocutory order unless made on an application of such a character that whatever order had been made therefrom must finally have disposed of the matter in dispute. The other test stated by Lord Alverstone C.J. in *Bozson* v. *Altrincham Urban District Council*[8] and known as the *Bozson* test is: if the judgment or order as made finally disposes of the rights of the parties, it is a final order, otherwise it is an interlocutory order. See *Tampion* v. *Anderson*[9] at page 12.

En passant, it is not without interest to note that Lord Denning M.R. who applied the *Salaman* test had himself admitted that Lord Alverstone C.J. was right in logic but he claimed that Lord Esher M.R. was correct in experience: *Salter Rex & Co.* v. *Ghosh*[10] at page 601.

The conflict in the English judicial decisions may never be resolved by the House of Lords since under section 68(2) of the Supreme Court of Judicature (Consolidation) Act, 1925, any doubt arising as to what orders are final and what are interlocutory is to be determined by the Court of Appeal. No similar inhibition exists to prevent this question of the correct test from being decided by the Privy Council from Malaysia. Mr. George for Haron says that our Malaysian Courts have in *Peninsular Land Development Sdn. Bhd.* v. *K. Ahmad (No. 2)*[11] and in *Hong Kim Sui* v. *Malayan Banking Berhad*[12] adopted the *Bozson* test in preference to the *Salaman* test, wrongly as it now turns out having regard to the later decisions of the Privy Council in *Becker* v. *Marion City Corporation*[13] and *Tampion* v. *Anderson, supra,* and we should now send the matter up for final determination.

In *Becker's* case, an order was made to the effect that the applicant was not entitled to require the local council to examine her proposed plan for subdivision lodged subsequently with the director and her right to appeal to Her Majesty in Council depended on whether their decision was a final judgment. Their Lordships in considering her application for special leave held that it was a final judgment since the negative answer to the question produced a state of finality and approved the judgment of Hogarth J. in the Supreme Court of South Australia in (1974) 9 S.A.S.R. 560 at page 562, that

> "for the purpose of these proceedings, I think that the order of the court was final. It finally decided the question whether or not the plaintiff was entitled to have her plan considered by (the Council). That was the lis; and that was finally determined adversely to her. Whichever way the decision went it was a final decision as between the parties. I think therefore that the judgment is a final judgment."

The issue whether the judgment was final and interlocutory was therefore decided by the finality effect. But the order was also made on an application of such a character that whatever order had been made therefrom must finally have disposed of the matter in dispute. Whatever the test that is applied, the order is a final order.

In *Tampion* v. *Anderson, supra,* the question was whether an order staying an action on the ground that it was frivolous and vexatious and an abuse of the process of the court is an interlocutory judgment. In holding that it was, their Lordships of the Privy Council referred to the continuing controversy between *Bozson* and *Salaman,* thought the attempt to frame a definition difficult and declined to do so. They adopted the suggestion of Lord Denning M.R. in *Salter Rex & Co.* v. *Ghosh, supra,* at page 601 when he said "This question of final or interlocutory is so uncertain that the only thing for practitioners to do is to look up the practice books and see what has been decided on the point. Most orders have now been the subject of decision." In their Lordships' opinion, this advice, even if it be distressing to the scientific lawyer, might nevertheless be the most helpful in any actual case. And, doing precisely that, they found a consistent line of authority to the effect that such an order is an interlocutory judgment, in *In re Page, Hill* v. *Fladgate;*[14] *Price* v. *Phillips;*[15] *Hunt* v. *Allied Bakeries Ltd.*[16] and the *dictum* of Lord Denning M.R. in *Salter Rex & Co.* v. *Ghosh, supra.*

Where they had refused to do so in *Tampion* v. *Anderson, supra,* it appears unlikely that their Lordships of the Privy Council would now agree to give a definition of final or interlocutory in this case if we were to succumb to the temptation offered us by Mr. George. In all probability, we would be told, go back to the practice books, as they did.

But before doing so, it is not without interest to note that the decision in *Salter Rex & Co.* v. *Ghosh, supra,* would have been the same whichever test was applied. Perhaps it was for this reason that Lord Denning M.R. made the suggestion of going back to the practice books.

And so far as we can discover, apart from the view of Lord Denning M.R. in *Salter Rex & Co.* v. *Ghosh* that an Order 14 judgment is interlocutory, there is only one other possibly applicable case which holds a judgment on admissions of fact is interlocutory: *Technistudy Ltd.* v. *Kelland.*[17]

But this court has, in *Ratnam* v. *Cumarasamy & Anor.*,[18] after reviewing the various cases, come to the conclusion that the test laid down in *Bozson* has been approved and followed in the Court of Appeal in England in subsequent cases though not in *In re Page, supra.* And it has in *Peninsular Land Development Sdn. Bhd.* v. *K. Ahmad (No. 2), supra,* and in *Hong Kim Sui & Anor.* v. *Malayan Banking Berhad, supra,* preferred the *Bozson* test to the *Salaman* test and held that an order giving leave to sign final judgment is a final and not an interlocutory judgment.

In the absence of any of the exceptions stated in *Young* v. *British Aeroplane Co. Ltd.*,[19] we are bound to follow these two decisions. But even if we believe that they have been wrongly decided and not merely *per incuriam* (see the definition by Lord Goddard C.J. in *Huddersfield Police Authority* v. *Watson*[20] at page 847), we would heed the admonition given by the House of Lords in *Davis* v. *Johnson*[21] that in such a case we should follow our previous decisions and leave the matter to be corrected on appeal as being the most convenient and quickest way of having the law determined.

Mr. Sivalingam suggests that the situation is really this: If the order refusing to strike out the third party notice and the Order 14 judgment are interlocutory, then the certificate obtained on the solicitors' application renders the appeal to the Federal Court competent. If the Order 14 judgment is final, then no leave is required. The appeal is as of right. The appeal to this court was in the main from the Order 14 judgment. The other order was not very material, as, it will be seen later, the subject matter will be adjudicated in another action which Haron had earlier instituted against Central Securities and which was the basis for the application itself. So long as the Order 14 judgment is set aside and the matter goes to trial, the application to strike out the third party notice on the ground that the matter would be adjudicated in this earlier action would not be of any material significance.

We therefore do not consider that there is any real difference in appeal procedure requiring us to make, as it were, a reference to the Privy Council for final determination and in all the circumstances of this case, we must decline on this ground alone.

But the consideration still remains whether, in our view, this case is otherwise a fit one for appeal. For this purpose it is necessary to refer to the pleadings in some detail.

The plaintiff, Syarikat Seri Padu Sdn. Bhd., (Seri Padu) commenced this action as purchaser against Haron effectively for rescission of a contract made on March 15, 1975 to buy 560,000 $1 shares in a company listed on the Stock Exchange and known as the United Holdings Berhad (United Holdings). The cost agreed at $8 per share came to $4,480,000. The full purchase money was alleged to have been paid over, but only 36,722 shares with registrable transfers were handed over. The balance of 523,278 shares had, it was alleged, up to the institution of the action on May 17, 1977, i.e. rather more than 2 years later, not been delivered. If the complaint was that these shares were not delivered, it is not true. These shares were delivered in circumstances that will appear later in this judgment. The other 36,722 shares delivered were accepted, without prejudice to Seri Padu's rights, so it was claimed, to rescind or claim for damages or other reliefs for breach of contract. The gist of the complaint was the failure to hand over the 523,278 shares at all. The claim was therefore for a sum of $4,186,244 in respect of these particular shares, damages (though no pleas were made in the statement of claim that Seri Padu had suffered any damages), interest and costs.

In his affidavit in support of his application for a third party notice, Haron claimed to have bought and received 1,400,000 United Holdings shares at the same price of $8 per share from Central Securities on December 7, 1974 for $11,200,000. Amongst the share certificates delivered to him was one, numbered 0227 for 523,278, and it is clear that the subject matter of the apparent difference between Seri Padu and Haron concerned this particular share certificate.

It was alleged by Haron in his affidavit and this allegation was repeated in an averment in his statement of claim against Central Securities that it was only on or about December 13, 1976 that Seri Padu and he discovered that the transfer accompanying this particular share certificate was executed by one Dr. Chong Kim Choy, the registered owner, into the name of International Holdings (Pte) Ltd. It was implied in this averment that share certificate No. 0227 was accepted by Haron and later by Seri Padu without knowledge that it was not transferable but if physical delivery was admitted, the pleadings lacked any explanation how a nominated transfer form was accepted and registered and discovery of the ineffectiveness of the transfer only made some 2 years after the first transaction, and what happened to these shares in the meantime. But it constituted the basis of the claim against the third party, which was therefore for $4,186,224 the precise claim against Haron by Seri Padu.

Central Securities' summons-in-chambers to set aside the third party notice was made on two grounds. The first was that there was no proper question to be tried between them and the reason was that "agreement was performed." This ground appears surprising, but quite clearly a director of Central Securities thought that by delivery and acceptance of a non-registrable transfer by the purchaser the vendor had performed its part of the bargain. The second was on the ground of prolix and vexatious proceedings, termed by the solicitors for Central Securities as "bad for duplicity," a phrase borrowed from criminal law. It was founded on the existence of another action, K.L. High Court No. 2323 of 1976 commenced earlier by Haron against Central Securities for rescission of the entire contract of sale of the 1,400,000 shares and refund of the entire sum of $11,200,000 on the conten-

tion that the shares were at the institution of the action completely valueless. The claim of Haron in this earlier suit clearly included the claim in the third party action. We shall have to return to the pleadings on this earlier suit later and now turn to the events in this action.

In the event, Haron consented to judgment being entered against him by Seri Padu. With this judgment we are not concerned. Central Securities' application to set aside the third party notice was dismissed and Haron's application to sign final judgment as on an Order 14 application was allowed. Central Securities then appealed to this court and this court in a reserved judgment delivered on May 16, 1979 allowed the appeal from the final judgment entered and ordered the action to be consolidated with the earlier suit and tried together.

In this earlier action, Haron claimed for the rescission of the entire contract of sale of 1,400,000 shares on an allegation of fraud, which was particularised as a claim by Central Securities to be at all material times the beneficial owner of the shares, when in fact it was not. Haron appeared to claim that the ownership of the shares was a material particular as without it he would not have agreed to buy. He did not think that in a contract of sale, what was material was the ability of the vendor to deliver the goods agreed to be sold within the time limited or within such time as was reasonable in the circumstances when time was not of the essence. The defence however said it owned 1,002,000 shares which it had delivered to Haron, that it had contracted to purchase the remaining 398,000 shares and for that reason had described itself as the beneficial owner of the entire bundle of shares agreed to be sold and that subsequently it had entered into a supplemental agreement for the purchase of the 398,000 shares, to the knowledge of Haron. It alleged that it had delivered all the shares contracted to be sold but as was seen earlier, the shares delivered consisted of a script for 523,278 which could not be validly transferred to anybody but the named transferee. The fact remained however that this particular share certificate was for a greater part of the period between the acceptance and the claim in both actions registered in the name of Seri Padu and as the judgment of this court observed, required explanation in view of a letter from United Holdings refusing initially to register which would appear to contradict the assertion of Haron and Seri Padu that it only discovered this restricted transfer two years later and in view of the use made by Haron and Seri Padu to gain control of United Holdings: see the judgment of this court at pages 18-23. But it is also to be observed that at no time either had Central Securities ever offered any explanation how it came to sell share certificate No. 0227 without a valid transfer executed by the registered holder in blank or in the name of the purchasers or his nominee or nominees. All it relied on was that both Haron and Seri Padu, of which Haron was a director, had acted on it and both Seri Padu in the person of Koh Kim Chai, a director and Haron had been enabled to get on the board of directors of United Holdings and control the company and direct its operations from that time onwards.

In the circumstances shown in the affidavits, this court considered that the simple and uncomplicated view taken by the High Court of a delivery of the articles sold which the vendor had no title to pass was not justified and that triable issues had been raised and a defence on the merits shown which on well-established principles applicable to an Order 14 application entitled the respondent Central Securities to defend unconditionally. In the exercise of its discretion, this court also ordered a consolidation of this action with the earlier action. The judgment of the court also meant that the third party directions on Haron's application be issued and the claim of Haron against Central Securities proceed to trial after the relevant pre-trial procedures and documentation had been completed.

We need only to refer to the previous judgment of this court to show that this is not merely a case of a total failure of consideration. We do not consider that this is a fit case for appeal. In our view the evidence must be gone into and what the parties really require is an early date for trial. Mr. Sivalingam for Central Securities has expressed a desire for an early trial. The Chief Justice assures the parties that he will assist them in getting an early date.

The applications are dismissed with costs.

Applications dismissed.

Solicitors: *Ng Ek Teong & Partners; Mah Kok & Din.*

TAN HOCK CHAN v. KHO TECK SENG

[F.C. (Chang Min Tat F.J., Salleh Abas F.J. & Charles Ho J.) September 6 & November 3, 1979]

[Kuching — Federal Court Civil Appeal No. 129 of 1979]

Contract — Building Contract — Failure by owner to give effective possession — Breach of covenant — Right to rescind — Claim for quantum meruit.

In this case the respondent was a building contractor who was employed by the appellant to build 6 units of 3 storeyed shophouses at the agreed cost of $223,000. Payment for the construction was by progress payments dependent on the completion of the several stages of construction. The contractor completed 5 of the 6 shophouses. He put some work on the sixth shophouse but was unable to complete because of a claim by the occupier of the land to ground tenancy rights. The respondent claimed the balance of the contract price less the amount paid to him under the progress payments and also for extra work and materials supplied. The learned trial judge awarded the respondent $5,540 on a quantum meruit and $6,500 assessed as the reasonable profit which the contractor could expect to make on the one house. The appellant appealed.

Held: (1) by his failure to give effective possession of the lot for the sixth house, the appellant had broken his covenant and the respondent could rescind the contract;

(2) in this case the appellant had rescinded the contract when he served the writ and the statement of claim on the appellant;

(3) the claim for quantum meruit for work done and for cost of extras must succeed but the claim for loss of profits could not succeed.

Cases referred to:-

(1) *Larking* v. *Great Western (Nepean) Gravel Ltd.* (1940) 64 C.L.R. 221.